Supreme Court, U.S.
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No. 99-929

IN THE

Supreme Court of the United States

REBECCA MCDOWELL COOK,

Petitioner,

v.

DONALD J. GRALIKE AND MIKE HARMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held unconstitutional an amendment to the Missouri Constitution requiring the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" to appear on the ballot next to the name of any congressional candidate deemed by a state official to have failed to support a state-favored term limits amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
COUNTERSTATEMENT	3
REASONS FOR DENYING THE WRIT	5
I. THERE IS NO CONFLICT WARRANTING THIS COURT'S REVIEW	5
II. THE EIGHTH CIRCUIT CORRECTLY HELD THAT THE MISSOURI AMENDMENT IS UNCONSTITUTIONAL	11
CONCLUSION	22

TABLE OF AUTHORITIES

	Page
Cases:	
American Fed. of Labor-Congress of Indus. Orgs. v. *Eu*, 686 P.2d 609 (Cal. 1984)	13
Anderson v. *Martin*, 375 U.S. 399 (1964)	17
Barker v. *Hazeltine*, 3 F. Supp. 2d 1088 (D. S.D. 1998)	*passim*
Bennett v. *Spear*, 520 U.S. 154 (1997)	11
Blodgett v. *Campbell*, 508 U.S. 1301 (1993)	9
Bramberg v. *Jones*, 978 P.2d 1240 (Cal. 1999)	*passim*
Brown v. *Hartlage*, 456 U.S. 45 (1982)	18
Burson v. *Freeman*, 504 U.S. 191 (1992)	18
Donovan v. *Priest*, 931 S.W.2d 119 (Ark. 1996), *cert. denied*, 519 U.S. 1149 (1997)	5, 12, 14
Grayned v. *City of Rockford*, 408 U.S. 104 (1972)	11
Hawke v. *Smith*, 253 U.S. 221 (1920)	12
Hurley v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)	15, 17
In re Initiative Petition No. 364, 930 P.2d 186 (Okla. 1996)	6, 12, 15
Jones v. *United States*, 119 S. Ct. 2090 (1999)	11
Kimble v. *Swackhamer*, 439 U.S. 1385 (1978)	8, 9
League of Women Voters of Maine v. *Gwadosky*, 966 F. Supp. 52 (D. Me. 1997)	*passim*
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974)	17
Meyer v. *Grant*, 486 U.S. 414 (1988)	18
Miller v. *Moore*, 169 F.3d 1119 (8th Cir. 1999)	*passim*
Morrisey v. *State of Colorado*, 951 P.2d 911 (Colo. 1998)	5, 15
Riley v. *National Fed. of Blind of N.C., Inc.*, 487 U.S. 781 (1988)	15, 17
Rosenberger v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995)	18
Simpson v. *Cenarrusa*, 944 P.2d 1372 (Idaho 1997)	*passim*
State of Montana v. *Waltermire*, 691 P.2d 826 (Mont. 1984)	13

TABLE OF AUTHORITIES—Continued

	Page
Timmons v. *Twin Cities Area New Party*, 520 U.S. 351 (1997)	18, 19
Turner Broadcasting System, Inc. v. *FCC*, 512 U.S. 622 (1994)	18
U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995)	1, 2, 19
West Virginia State Bd. of Ed. v. *Barnette*, 319 U.S. 624 (1943)	15, 16
Wisniewski v. *United States*, 353 U.S. 901 (1957)	10
Wooley v. *Maynard*, 430 U.S. 705 (1977)	15, 16
Constitutional Provisions:	
Qualifications Clauses, U.S. Const., Art. I, § 2, cl. 2, § 3, cl. 3	1
Speech and Debate Clause, U.S. Const., Art. I, § 6, cl. 1	21
U.S. Const., Art. V	6
Mo. Const., Art. VIII, § 16	3
Mo. Const., Art. VIII, § 17(1)	3
Mo. Const., Art. VIII, § 17(2)	3
Mo. Const., Art. VIII, § 17(2)(a)-(h)	4
Mo. Const., Art. VIII, § 18(1)	4
Mo. Const., Art. VIII, § 18(3)	4
Mo. Const., Art. VIII, § 19(1)	4
Rule:	
S. Ct. R. 14.1(a)	11
Other Authorities:	
Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988)	14
Benjamin J. Cluff, *Federal Term Limits in Idaho: Once, Twice, Three Times Unconstitutional?*, 36 Idaho L. Rev. 119 (1999)	20

TABLE OF AUTHORITIES—Continued

	Page
Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 Va. L. Rev. 1533 (1999)	2
Philip B. Kurland & Ralph Lerner, eds., 5 *The Founders' Constitution* (1987)	14
Robert L. Stern, *et al.*, *Supreme Court Practice* (7th ed. 1993)	10

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Donald J. Gralike and Mike Harman respectfully request that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in this case.

INTRODUCTION

In *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779 (1995), this Court held that the Constitution forbids a State from imposing "term limits" on Members of Congress because a State may not add to the three qualifications for congressional service stated in the Qualifications Clauses, *i.e.*, minimum age, national citizenship, and state inhabitancy. *See* U.S. Const., Art. I, § 2, cl. 2; *id.* § 3, cl. 3. The Court advised that congressional term limits, if they are to be adopted, "must come not by legislation adopted by either

Congress or by an individual State, but rather—as have other important changes in the electoral process—through the amendment procedures set forth in Article V." *Thornton*, 514 U.S. at 837 (footnote omitted).

This case involves a patently unconstitutional effort by the State of Missouri to circumvent *Thornton* by dictating that all candidates for Congress support a constitutional term limits amendment favored by the State and by attaching pejorative ballot labels next to the names of those candidates who hold different views. A year after *Thornton* was decided, Missouri voters in November 1996 adopted an amendment to the Missouri Constitution ("the Missouri Amendment") requiring that the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" appear on the ballot next to the name of any congressional candidate deemed by a state official to have failed to support term limits of the sort and in the manner prescribed in the Missouri Amendment. Pet. App. A2-A4.

Similar measures were either proposed or voted on in more than a dozen other states during the 1996 election cycle. *Id.* at A2 n.3. "The term limits advocacy group responsible for proposing these notations calls them 'Informed Voter' ballot notations; opponents refer to them as 'Scarlet Letter' notations." Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 Va. L. Rev. 1533, 1537 (1999). Eight of the ballot label initiatives proposed or adopted in 1996 have been challenged in court, and all eight—including the Missouri Amendment—have been invalidated on constitutional grounds. *See* Pet. App. A2 n.3 (citing cases). In 1998, another similar initiative, Proposition 225, was "narrowly adopted" in California, and it, too, was subsequently held unconstitutional. *Bramberg* v. *Jones*, 978 P.2d 1240, 1241 (Cal. 1999).

As the court of appeals held below, such Scarlet Letter laws contravene not one, but as many as four, separate constitutional provisions. Indeed, the unconstitutionality of such laws is so clear that even some of their supporters have given up defending them. In California, in the official ballot pamphlet distributed to voters, the *proponent* of Proposition 225, "acknowledged that measures similar to Proposition 225 had been found invalid by a number of other courts in other jurisdictions" and actually "urged voters *not* to vote in favor of Proposition 225." *Id.* (emphasis in original).

Measures such as the Missouri Amendment proposed or enacted in nine States have now been declared unconstitutional. No such measure has been upheld against constitutional challenge. The Court should therefore decline to expend its scarce resources reviewing a law that has been unanimously condemned by every court to have reviewed its kind.

COUNTERSTATEMENT

The Missouri Amendment proposes and sets forth the text of a term limits amendment to the United States Constitution that would limit Senators to two terms and Members of the House of Representatives to three terms. *See* Mo. Const., Art. VIII, § 16. The Missouri Amendment then "instruct[s]" every member of the State's congressional delegation "to use all of his or her delegated powers to pass the" proposed constitutional amendment. *Id.* § 17(1).

If a Senator or Representative from Missouri fails to comply with this instruction, the Missouri Amendment provides that when he or she next stands for election the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will be printed on the ballot next to the candidate's name in both the primary and general election. *Id.* § 17(2). Under the Amendment, this label is to appear beside the candidate's name if he or she (a) fails to vote in favor of the proposed term limits amendment; (b) fails to second the

proposed amendment if a second is lacking; (c) fails to propose or otherwise bring to a vote the proposed amendment; (d) fails to vote in favor of bringing the proposed amendment before committee or subcommittee; (e) fails to vote against all measures to delay, table, or otherwise prevent a vote by the full body; (f) fails to vote against any amendment allowing longer terms than the proposed amendment; (g) sponsors or cosponsors any proposal to increase term limits beyond those in the proposed amendment; or (h) fails to ensure that all votes on the proposed amendment are recorded and made publicly available. *See id.* § 17(2)(a)-(h).

The Missouri Amendment also provides that non-incumbent candidates for Congress who decline to take a term limits "pledge" shall have the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed beside their names on every primary and general election ballot. *Id.* § 18(1). The pledge states: "I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation 'DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS' will not appear adjacent to my name." *Id.* § 18(3).

Petitioner—Missouri's Secretary of State—is responsible for determining whether incumbent and non-incumbent candidates for Congress shall have the "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" label placed next to their names. *See id.* § 19(1).

Respondent Donald J. Gralike, who was a candidate for Congress from Missouri's Third District in 1996, filed suit challenging the Missouri Amendment. The District Court granted summary judgment in Gralike's favor, holding that the Missouri Amendment violated three provisions of the United States Constitution: the Qualifications Clauses of

Article I, Article V, and the First Amendment. *See* Pet. App. A5, A33-A34. While the case was on appeal, respondent Mike Harman, a candidate for the Missouri Seventh District seat, intervened as an appellee. *See* Pet. ii.

The Eighth Circuit affirmed. The court of appeals held that Gralike was "entitled to judgment as a matter of law because the Missouri Amendment violates the First Amendment, the Speech and Debate Clause, the Qualifications Clause, and Article V of the United States Constitution." Pet. App. A22. Judge Hansen "readily concur[red]" with the holding that "the labeling provisions (§§ 17, 18, and 19) of the Missouri Amendment [are] in violation of the Constitution" but dissented in part on the narrow issue of whether part of the Missouri Amendment should be severed from the unconstitutional remainder. *Id.* at A23.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WARRANTING REVIEW BY THIS COURT.

As the Eighth Circuit observed (Pet. App. A2 n.3), and as petitioner concedes (Pet. 13-14), every court to have considered a measure similar to the Missouri Amendment has invalidated it on federal constitutional grounds and, in some cases, on state constitutional grounds as well.[1]

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[1] *See Miller* v. *Moore*, 169 F.3d 1119 (8th Cir. 1999) (Nebraska Article XVIII violates Article V and right to vote); *Barker* v. *Hazeltine*, 3 F. Supp. 2d 1088 (D. S.D. 1998) (South Dakota Initiated Measure 1 violates Article V, First Amendment, Speech and Debate Clause, and Due Process Clauses); *League of Women Voters of Maine* v. *Gwadosky*, 966 F. Supp. 52 (D. Me. 1997) (Maine Congressional Term Limits Act of 1996 violates Article V); *Donovan* v. *Priest*, 931 S.W.2d 119 (Ark. 1996) (proposed Arkansas Amendment 9 violates Article V), *cert. denied*, 519 U.S. 1149 (1997); *Bramberg* v. *Jones*, 978 P.2d 1240 (Cal. 1999) (California Proposition 225 violates Article V); *Morrisey* v. *State of Colorado*, 951 P.2d 911 (Colo. 1998) (Colorado Amendment 12

Although the Eighth Circuit concluded that the Missouri Amendment violates four separate constitutional provisions, the only conflict petitioner alleges concerns the court's holding that the Amendment violates Article V. *See* Pet. 12. As to the court's other three holdings, petitioner claims no conflict but states only that "the Court should grant the petition because of the importance of the issues involved." *Id.* On the Article V holding, petitioner claims that the Eighth Circuit's opinion in this case conflicts with an opinion of "the Supreme Court of Idaho, an opinion authored by then Justice Rehnquist and an earlier opinion of the Eighth Circuit." *Id.* There is, however, no conflict between the Eighth Circuit's holding that the Missouri Amendment violates Article V and any of these three decisions.

Article V prescribes the exclusive methods by which the Constitution may be amended. First, Congress may propose an amendment on the two-thirds vote of each House. Second, Congress must call a convention for proposing amendments if the legislatures of two-thirds of the States apply for one. In either case, a proposed amendment becomes valid when ratified by the legislatures of three-fourths of the States or conventions held in three-fourths of the States. *See* U.S. Const., Art. V. Thus, as the Eighth Circuit noted, "Article V specifically delegates the amendment process to legislative bodies, not the voters." Pet. App. A20. *See also Miller*, 169 F.3d at 1123 ("the voters in an individual state have, at best, a very limited role in the amendment process"); *League of Women Voters*, 966 F. Supp. at 59 ("It is left to Congress and the state legislatures to propose and ratify amendments to the Constitution."). The Eighth Circuit held here that "[v]oter

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violates Article V and Guarantee Clause); *Simpson* v. *Cenarrusa*, 944 P.2d 1372 (Idaho 1997) (Idaho Proposition 4 violates Speech and Debate Clause, First Amendment, and Idaho Constitution); *In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996) (Oklahoma Initiative Petition No. 364 violates Article V and Oklahoma Constitution).

initiatives which seek to coerce legislators into proposing or ratifying a particular constitutional amendment violate Article V." Pet. App. A22. The Missouri Amendment, said the court, was an impermissible "attempt by the voters to directly influence the Article V process by directing Senators and Representatives from Missouri to support and pursue the proposal and ratification of a term limits amendment to the United States Constitution." *Id.*

a. There is no conflict between the decision below and *Simpson* v. *Cenarrusa*, 944 P.2d 1372 (Idaho 1997). There, the Idaho Supreme Court held that Idaho's Proposition 4 violated the Speech and Debate Clauses of the United States and Idaho Constitutions insofar as it punished incumbent congressional candidates with the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS." *See id.* at 1374-75. The court also held that Proposition 4 violated the free speech provision of the Idaho Constitution to the extent that it subjected non-incumbents to the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS." *See id.* at 1375-76. Thus, far from being in conflict, *Simpson* and the decision below both invalidated the ballot labeling provisions before them.

After invalidating the labeling provisions, the Idaho Supreme Court went on to hold that Proposition 4's instruction provision—*i.e.*, the provision instructing Idaho's congressional delegation to use all their powers to pass the proposed term limits amendment—did not violate Article V. The court reasoned that the labeling provisions could be severed from the rest of Proposition 4, and that, absent of the compulsion of the labels, the instruction provision would be nothing but a "nonbinding, advisory initiative." *Id.* at 1376. Therefore, the court held that "*[s]tanding alone*, the instructions concerning the proposed amendment do not violate Article V." *Id.* (emphasis added).

Although the Eighth Circuit in this case invalidated the Missouri Amendment's instruction provision on Article V grounds, there is no conflict between its decision and *Simpson*. Like the Eighth Circuit, the Idaho Supreme Court held the labeling provisions unconstitutional, and it was only because of that holding that the *Simpson* court construed the instruction provision as nonbinding and thus permissible. Here, the Eighth Circuit considered both the labeling and instruction provisions together, and held that both provisions were unconstitutional. Both courts, however, invalidated the mechanism through which Idaho and Missouri sought to coerce legislators into adopting a term limits amendment outside of the prescribed Article V procedures. The results of those cases are therefore entirely consistent.

Moreover, it is not surprising that the Eighth Circuit considered the labeling and instruction provisions together, for petitioner did not ask that court—and does not ask this Court—to take the two-step approach of the *Simpson* court to the Missouri Amendment. That is, petitioner does not suggest that the labeling provisions should be judged first, and if those provisions are invalidated, they should be severed and the instruction provision considered in isolation. Petitioner therefore has waived any argument that the approach taken in *Simpson* should have been, or should be, taken here.

b. Nor does the Eighth Circuit's decision conflict with the opinion of then-Justice Rehnquist, acting as Circuit Justice, in *Kimble* v. *Swackhamer*, 439 U.S. 1385 (1978). That opinion, of course, is not authoritative as to the merits of the Article V issue discussed in that case—as Justice Rehnquist himself recognized. *See id.* ("It scarcely requires reference to authority to conclude that a single Circuit Justice has no authority to 'summarily reverse' a judgment of the highest court of a State; a single Justice has authority only to grant interim relief in order to preserve the jurisdiction of the full Court to consider an applicant's claim on the merits."); *accord Blodgett* v. *Campbell*, 508 U.S. 1301, 1303-04 (1993) (O'Connor, J., in chambers). But even if it were, *Kimble* is wholly consistent with the result reached in this case.

In *Kimble*, "the Nevada legislature enacted a statute requiring the submission of an advisory question to the registered voters of the State as to whether the Equal Rights Amendment should be ratified by the legislature." 439 U.S. at 1386. Refusing to preliminarily enjoin the statute, Justice Rehnquist rejected the argument that it violated Article V by injecting "citizen participation in the amendatory process." *Id.* at 1387. Justice Rehnquist so concluded because the vote to be taken was merely a "nonbinding, advisory referendum." *Id.* at 1388. There is no conflict between *Kimble* and this case because, as the Eighth Circuit held, the Missouri Amendment was "far more than an advisory, non-binding show of voters' opinion on term limits." Pet. App. A21. If a candidate declines to support the state-favored term limits amendment, he or she will be severely penalized through highly pejorative ballot labels placed next to his or her name. Thus, the Eighth Circuit itself denied that its decision was inconsistent with *Kimble*, explaining that "unlike the Nevada legislators in *Kimble*, members of Missouri's congressional delegation are not free to disregard the instruction embodied in the Amendment." Pet. App. A21-A22.

c. Finally, there is not a conflict between the Eighth Circuit's decision in this case and the Eighth Circuit's prior decision in *Miller* v. *Moore*, 169 F.3d 1119 (8th Cir. 1999), that warrants review. In *Miller* the Eighth Circuit held that the labeling provisions of Nebraska Amendment XVIII violated Article V and the right to vote. Thus, the two panels *agreed* as to unconstitutionality of ballot labeling provisions such as those at issue here. The decision below and *Miller* differ only in that in *Miller* the Eighth Circuit concluded that Section 1 of the Nebraska Amendment, in which was "establish[ed] as the 'official position of the citizens and State of Nebraska' that its elected officials should enact a specific

term limits amendment," was severable from the invalidated portions of the Amendment. *Id.* at 1126. In this case, the Eighth Circuit refused to sever Section 15 of the Missouri Amendment—the Amendment's preamble—and Section 16—which contains the text of the proposed term limits amendment. *See* Pet. App. A22-A23 n.12. There is no conflict, however, because Sections 15 and 16 of the Missouri Amendment are quite different from Section 1 of the Nebraska Amendment. For one thing, the Missouri Amendment does not contain language regarding the "official position" of the citizens and State of Missouri.

Furthermore, the Eighth Circuit's refusal to sever part of the Missouri Amendment is not the sort of conflict that would warrant review by this Court. To begin with, that issue, as the Eighth Circuit said, is as much a "jurisprudential" issue as a constitutional issue. *Id.* The Eighth Circuit decided against severance in this case because it would involve "micro-management of the Missouri Constitution [and] would entangle this court too much in state law issues." *Id.* Furthermore, no matter how the severance issue is resolved, it does not affect the invalidity of the labeling and instruction provisions, which both the court below and *Miller* agreed were unconstitutional. Therefore, the severance issue is of little consequence. Had the Eighth Circuit in this case severed Sections 15 and 16 of the Missouri Amendment, all that would have been left was a proposed constitutional amendment lacking any provisions for securing its adoption. Whether the Eighth Circuit should have permitted the precatory provisions of the Missouri Amendment to remain in effect is not a question that warrants further review.

In any event, any intracircuit conflict between the Eighth Circuit's own decisions is a matter for the Eighth Circuit, not this Court, to resolve in the first instance. *See Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam); *see also* Robert L. Stern, *et al.*, *Supreme Court Practice* 176 (7th ed. 1993) ("Ordinarily, a conflict between decisions rendered

by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari."). Finally, even if the severance issue warranted review—and it does not—that narrow issue is not specifically addressed in the petition and is not "fairly included" within the scope of the questions presented therein. S. Ct. R. 14.1(a).

In sum, there is no conflict between the decision below and *Simpson* since the Eighth Circuit and the Idaho Supreme Court agreed on the unconstitutionality of the labeling provisions; there is no conflict with *Kimble*, as the Eighth Circuit itself recognized, since the Missouri Amendment, unlike the Nevada statute in *Kimble*, is not "nonbinding" or "advisory"; and any alleged conflict with the Eighth Circuit's *Miller* decision on the severance issue does not warrant review, if that issue has even been presented for review.

II. THE EIGHTH CIRCUIT CORRECTLY HELD THAT THE MISSOURI AMENDMENT IS UNCONSTITUTIONAL.

The Eighth Circuit held that the Missouri Amendment violates four separate constitutional provisions—the First Amendment, the Qualifications Clauses, Article V, and the Speech and Debate Clause. The court therefore did not reach respondent Gralike's additional argument that the Missouri Amendment is unconstitutionally vague. *See* Gralike's C.A. Br. 44-49 (citing, *inter alia*, *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972)). Thus, were the judgment below to be reversed, this Court would have to conclude that the Eighth Circuit erred on *all four* of these issues—and also that the Missouri Amendment is not void for vagueness. *See Jones* v. *United States*, 119 S. Ct. 2090, 2106 (1999) ("As the prevailing party, [respondent] is entitled to defend the judgment on any ground that it properly raised below."); *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997) (a respondent is entitled "to defend the judgment on any ground supported by the record" even if "not reached below"). As shown below, however, the Eighth Circuit—like every court before it—had ample

grounds for holding the Missouri Amendment unconstitutional. Any one of the court's four independent holdings is sufficient by itself to demonstrate that this case does not present unsettled issues warranting this Court's intervention. Taken together, these multiple holdings clearly warrant denial of the petition.

a. The Eighth Circuit correctly held that the Missouri Amendment violates Article V. Indeed, every court to consider a measure similar to the Missouri Amendment has concluded that the measure violated Article V. *See Miller*, 169 F.3d at 1123-24; *Barker*, 3 F. Supp. 2d at 1092-95; *League of Women Voters*, 966 F. Supp. at 55-63; *Donovan*, 931 S.W.2d at 122-128; *Bramberg*, 978 P.2d at 1246-52; *Morrisey*, 951 P.2d at 914-916; *In re Initiative Petition No. 364*, 930 P.2d at 191-193. As noted above, the Idaho Supreme Court found no Article V violation only because it had already held unconstitutional the labeling provisions through which Idaho Proposition 4 was to be enforced.

Like the courts cited above, the Eighth Circuit held that "[v]oter initiatives which seek to coerce legislators into proposing or ratifying a particular constitutional amendment violate Article V." Pet. App. A22. These holdings follow directly from this Court's Article V precedents, including *Hawke* v. *Smith*, 253 U.S. 221 (1920), in which this Court invalidated a provision of the Ohio Constitution subjecting to popular referendum the state legislature's ratification of amendments to the United States Constitution. In *Bramberg*, the California Supreme Court explained the invalidity under Article V of measures such as the Missouri Amendment. As the court explained, Article V

> vests the power to propose and ratify amendments to the United States Constitution solely in deliberative bodies—Congress, state legislatures, or constitutional conventions—and does not authorize such amendments either to be mandated or defeated by a direct vote of a state's electorate through an initiative or referendum. Because

> Proposition 225 both directly instructs, and indirectly attempts to coerce, California's congressional and state legislators in the exercise of their federal constitutional function of proposing and ratifying amendments to the United States Constitution, we conclude that the proposition clearly conflicts with the amendment process authorized by Article V and is therefore unconstitutional. [978 P.2d at 1241-42.]

Cf. State of Montana v. *Waltermire*, 691 P.2d 826 (Mont. 1984) (invalidating on Article V grounds voter initiative requiring state legislators to apply to Congress to call a convention to consider a balanced budget amendment to the Constitution or else remain in session indefinitely without pay); *American Fed. of Labor-Congress of Indus. Orgs.* v. *Eu*, 686 P.2d 609 (Cal. 1984) (same).

Petitioner recites a lengthy "History of Citizen Instructions" derived from a forthcoming law review article written by a professor who filed an *amicus* brief in support of petitioner in the court below. Pet. 14-17. This history is largely irrelevant, however, because—as petitioner herself admits—there is little or no historical practice supporting the use of disparaging ballot labels to enforce citizens' instructions to their congressional representatives. *See id.* at 17 n.14. Furthermore, directly contrary to petitioner's historical account, the Eighth Circuit in *Miller* concluded that "[a]n examination of the constitutional history behind popular 'instructions' to legislators gives us further cause to doubt the constitutionality of Article XVIII." 169 F.3d at 1124. The court explained:

> In 1789, the House of Representatives rejected a proposed "right to instruct Representatives" that would have been one of the rights specified in the First Amendment. James Madison and his fellow Federalists, in particular, feared that popular instructions to legislators would destroy legislative debate and make compromise impossible. They feared, in addition, that a right to instruct,

> whether or not legally binding on legislators, would convey to the people the idea that they had a right to control the debates of Congress, thus undermining the Federalists' scheme of representative government. [*Id.* (citing Philip B. Kurland & Ralph Lerner, eds., 5 *The Founders' Constitution* 200-206 (1987), and Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1058-60 (1988)).]

Thus, even if it were the Court's role to engage in abstruse academic debates where the Court's precedents provide a ready answer, it is far from clear that history is unequivocally on petitioner's side.

Relying on *Kimble* and *Simpson*, petitioner asserts that the Missouri Amendment "does not operate as a handicap on candidates" and "is by its term non-binding." Pet. 20, 21. Against petitioner's assertion, however, is the considered judgment of four federal and four state supreme courts—not to mention common sense—that the use of pejorative ballot labels such as "DISREGARDED VOTER'S INSTRUCTION ON TERM LIMITS" is inherently coercive.[2] Petitioner even

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[2] *See* Pet. App. A21 ("the Missouri Amendment is far more than an advisory, non-binding show of voters' opinion on term limits"); *Miller*, 169 F.3d at 1124 ("Nebraska's Article XVIII represents a clear attempt to coerce or bind legislators into exercising their Article V powers to pass a term limits amendment" and is not "merely an advisory statement of popular opinion that legislators are free to ignore"); *Barker*, 3 F. Supp. 2d at 1094 ("The ballot labels at issue here are not neutral. * * * These labels coerce congressional candidates to follow the dictates of Initiated Measure 1 regardless of the merits of the term limits proposal contained within it."); *League of Women Voters*, 966 F. Supp. at 60 (argument that the Maine Act "is not coercive but rather provides nonbinding instructions from Maine's voters to their legislators * * * raises naivete to new heights"); *Donovan*, 931 S.W.2d at 127-128 (proposed Arkansas Amendment 9 is "binding on the legislators in an extortive manner as failure to heed the amendment's instructions will result in their threatened potential political death"); *Bramberg*, 978 P.2d at 1249 ("unlike the measure at issue in *Kimble*, Proposition 225 clearly is not a purely advisory measure"); *Morrisey*, 951 P.2d at 916 (rejecting argument that Colorado Amendment 12's "ballot designations are merely informational and resemble other permissible designations such as the candidate's party affiliation"); *In re Initiative Petition No. 364*, 930 P.2d at 193 (Oklahoma initiative petition "would be neither nonbinding nor purely advisory in its federal aspects. * * * This is an express mandate from the people to the Legislature to take a specific action.").

admits (albeit half-heartedly) that the DISREGARDED VOTER'S INSTRUCTION ON TERM LIMITS label "may have some risk, despite its relatively nebulous nature, of leaving a negative impression with voters." Pet. 20-21 n.18. As eight courts have concluded, there is no other impression that could possibly be left.

b. The Eighth Circuit also correctly held that the Missouri Amendment violates the First Amendment. *See* Pet. App. A6-A14. *See also Barker*, 3 F. Supp. 2d at 1095 ("it is hard to imagine a more chilling impact on political speech than that created by Initiated Measure 1"); *Simpson*, 955 P.2d at 1375-76 (Idaho Proposition 4 violates free speech provision of Idaho Constitution). This Court has consistently interpreted the constitutional guarantee of freedom of speech to include the right *not* to speak. *See, e.g.*, *Riley* v. *National Fed. of Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Wooley* v. *Maynard*, 430 U.S. 705 (1977); *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943); *see also Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (compelled association case). As the Court said in *Riley*, "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." 487 U.S. at 796-797 (emphasis in original).

The Missouri Amendment compels speech in two ways. *See* Pet. App. A8. First, it compels candidates to speak in favor of term limits by threatening them with the ballot labels if they do not. Non-incumbents, in particular, are forced to speak since they must recite the term limits "pledge" to avoid being labeled. *See Barnette* (impermissible to require recitation of pledge of allegiance). Second, if an incumbent is deemed to have failed to support the proposed term limits amendment, or if a non-incumbent refuses to take the term limits pledge, a label will appear on the ballot next to his or her name, thus ascribing to the candidate a position and statement he or she did not wish to make. *See Wooley* (requirement that state motto "Live Free or Die" appear on license plates impermissibly ascribed view to motorists). And as the Eighth Circuit correctly noted, "[t]he point of view the labels ascribe to candidates may not even be accurate. * * * Regardless of a candidate's opinion about term limits in general, if the candidate does not support the specific limit prescribed in the Missouri Amendment, * * * he or she will be branded as an opponent to the Missouri Amendment and to the wishes of the voters of Missouri." Pet. App. A12 n.7.

Petitioner argues that the Missouri Amendment does not compel speech but rather that "the people simply comment on the silence or behavior of their congressional candidates." Pet. 26. The Eighth Circuit rightly concluded, however, that "the labels do far more than advise voters of a candidate's opposition to term limits" since they are "phrased in such a way as to give (and we believe are calculated to give) a negative impression not only of a labeled candidate's views on term limits, but also of his or her commitment and accountability to his or her constituents. * * * Each label implies that a labeled candidate cannot be trusted to carry out the people's bidding, which in turn casts doubt on his or her suitability to serve in Congress." Pet. App. A9. *Accord Barker*, 3 F. Supp. 2d at 1096 ("these ballot labels essentially

brand the candidates as unworthy of public office"). And the labels "are particularly harmful because they appear on the ballot, an official document produced by the state" and thus "appear to be an official denunciation of certain candidates." Pet. App. A10.

Petitioner argues that the Missouri Amendment "does not compel any speech" because it involves no "threat of criminal prosecution." Pet. 26. But as the Eighth Circuit correctly noted, the compelled speech doctrine "has never been limited to those cases in which the state seeks to impose or compel speech through threat of financial or criminal sanction." Pet. App. A8. *See Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (statute requiring newspaper to print reply of candidate criticized by the paper violates First Amendment "[e]ven if a newspaper would face no additional costs to comply with" the law); *see also Riley* (non-criminal case); *Hurley* (same). Petitioner cites no case to the contrary.

The Missouri Amendment actually goes even further than compelling speech. It penalizes legislators and candidates—in a viewpoint discriminatory manner—for adopting substantive views contrary to those expressed by a majority of Missouri voters at one particular point in time. The Amendment attaches pejorative labels to the names of those candidates who hold a governmentally-disfavored position on the term limits issue, and only that issue. And "the labels appear at the critical instant of voting, during which the labeled candidate cannot contact the voter to defend himself or herself against the label." Pet. App. A10 n.6. *See Barker*, 3 F. Supp. 2d at 1094 (the ballot labels "are disseminated to voters at a time when voters are most susceptible to persuasion—while they are in the ballot box—and at a time when candidates are most vulnerable"); *see also Anderson* v. *Martin*, 375 U.S. 399, 402 (1964) (law requiring ballots to designate candidate's race puts a "label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast"). Missouri has placed the weight of the State

squarely on one side of a political debate in a heavy-handed effort to influence the outcome of elections. The First Amendment was intended precisely to prohibit such governmental interference with the free flow of political discourse.

Petitioner argues that the Eighth Circuit "failed to apply the proper test" under the First Amendment. Pet. 26. The Eighth Circuit applied strict scrutiny to the Missouri Amendment, and was right to do so. Not only does the Missouri Amendment compel and penalize political speech connected to campaigns for public office—the sort of speech to which maximum First Amendment protections apply—but the Amendment is also content-based (it focuses only on term limits) and even viewpoint-based (it is pro-term limits) in its regulation of political speech. There can be no doubt that strict scrutiny applies to such a law. *See Brown* v. *Hartlage*, 456 U.S. 45, 53 (1982) (First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office") (quotation marks omitted); *Meyer* v. *Grant*, 486 U.S. 414, 425 (1988) (First Amendment is "at its zenith" in the area of political speech); *Burson* v. *Freeman*, 504 U.S. 191, 198 (1992) (applying strict scrutiny to "content-based restriction on political speech"); *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 642 (1994) (content-based "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny") (citing *Riley* and *Barnette*); *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination."). *See also Barker*, 3 F. Supp. 2d at 1095 (applying strict scrutiny to South Dakota Initiated Measure 1).

Finally, petitioner argues that the citizens of Missouri have their own First Amendment right to communicate on the ballot information about the candidates' position on term limits. *See* Pet. 25. In *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351 (1997), however, this Court rejected a

claimed right "to us[e] to ballot to communicate to the public" and "to send a particularized message" to the voters, *id.* at 362, 363, explaining that "[b]allots serve primarily to elect candidates, not as fora for political expression." *Id.* at 363. The ballot is not, of course, the only avenue of communication open to those Missourians who support term limits. Term limit supporters remain free "to communicate ideas to voters and candidates through [their] participation in the campaign" itself. *Id.* Petitioner's approach "would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising." *Id.* at 365.

c. As the third ground for invalidating the Missouri Amendment, the Eighth Circuit held that, under this Court's decision in *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779 (1995), the Amendment violates the Qualifications Clauses of Article I. This holding, too, presents no important unsettled issue warranting this Court's review.

Although the Missouri Amendment does not directly prohibit a term-limited candidate from running for or serving in Congress, neither did the Arkansas Amendment invalidated in *Thornton*. The Arkansas Amendment provided that term-limited congressional candidates could not have their names appear on the ballot, but it permitted such candidates to run as write-in candidates and to serve if elected. *See id.* at 828. This Court, however, rejected the argument "that only a legal bar to service creates an impermissible qualification." *Id.* "In our view," said the Court, "Amendment 73 is an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly." *Id.* at 829. The Court therefore "h[e]ld that a state amendment is unconstitutional when it has the *likely effect* of handicapping a class of candidates and has the *sole purpose* of creating additional qualifications indirectly." *Id.* at 836 (emphasis added).

Petitioner agrees that this is the applicable test of the Missouri Amendment's constitutionality under the Qualifications Clauses; she disputes only the Eighth Circuit's application of the *Thornton* test to the Missouri Amendment. *See* Pet. 22-23. There is no need for this Court to review the Eighth Circuit's application of that test on the facts of this case to invalidate the Missouri Amendment.

The Eighth Circuit held that the Missouri Amendment failed the *Thornton* test. The court concluded, first, that the labeling provisions of the Missouri Amendment would have the likely effect of handicapping "a distinct class of candidates—those who oppose term limits, refuse to take the term limits pledge, or fail to do one or more of the actions prescribed by the Amendment while serving in Congress," Pet. App. A17-A18, and, second, that "adding the term limit qualification is the sole purpose of the Missouri Amendment." *Id.* at A18. *See also* Benjamin J. Cluff, *Federal Term Limits in Idaho: Once, Twice, Three Times Unconstitutional?*, 36 Idaho L. Rev. 119, 121 (1999) ("In effect, these [ballot label] laws are an attempt to circumvent the *U.S. Term Limits* decision.").

Petitioner disputes that the labels would have the likely effect of handicapping a candidate. *See* Pet. 23. But the Eighth Circuit quite properly concluded that labels would "cast doubt on labeled candidates' ability to represent constituents, since the labels state that labeled candidates ignore their constituents' wishes." Pet. App. A18. Petitioner also argues that the intent of the Missouri Amendment was not to add a qualification for Congress but "to amend the Constitution and for that amendment to create a limitation on congressional service." Pet. 23. This argument was previously made to the Eighth Circuit, and the court rejected it, saying that the fact that the Missouri Amendment seeks to add a term limits qualification "by compelling members of Congress from Missouri to initiate, pursue, and support the Article V amendment process does not change the analysis

under *U.S. Term Limits*, as it is still an indirect attempt to add a qualification to those listed in the Qualifications Clause." Pet. App. A18.

Given the undisputed lack of any conflict on this issue, there is no cause for this Court to intervene in this case only to confirm that measures such as the Missouri Amendment—like the Arkansas Amendment considered in *Thornton*—have the purpose and likely effect of adding an additional qualification for federal office, in violation of the Qualifications Clauses.

d. The fourth and final ground on which the Eighth Circuit held the Missouri Amendment unconstitutional (insofar as it applied to incumbent candidates), was the Constitution's Speech and Debate Clause, U.S. Const., Art. I, § 6, cl. 1. *See* Pet. App. A14-A18. Two other courts have agreed with that determination, *see Barker*, 3 F. Supp. 2d at 1096; *Simpson*, 944 P.2d at 1375, and petitioner cites no contrary Speech and Debate Clause cases arising in a factually similar context. In light of the unanimity of views, further review of this issue by this Court is unwarranted. It would also be an unnecessary exercise. Because of the Missouri Amendment's many other constitutional flaws, there is no need even to review the Eighth Circuit's Speech and Debate holding.

* * *

If the constitutionality of ballot label initiatives such as the Missouri Amendment was ever a burning issue, it is no longer. In each of the nine jurisdictions in which such a measure has been challenged, the measure has been found unconstitutional. In California, the last State to enact such a measure, the proponent of Proposition 225 actually urged the voters to cast their votes *against* the measure, explaining that " 'passage of this measure will likely result only in needless and costly litigation.' " *Bramberg*, 978 P.2d at 1047 (quoting the official ballot pamphlet). The proponent encouraged voters "instead to support another measure relating to con-

gressional term limits that the proponent indicated would be presented to the voters in the future." *Id.* Since the constitutionality of measures such as the Missouri Amendment has been unanimously rejected by state supreme courts and the lower federal courts, and since the term limits movement itself appears to have abandoned this front in the battle for term limits, further review of this matter by this Court clearly is unwarranted.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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